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740280—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1197

RINEHARD H. PETERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 150–156) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered February 3, 1947 (R. 156), and a petition for rehearing (R. 157–162) was denied March 4, 1947 (R. 163). The petition for a writ of certiorari was filed April 3, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, by the Act of February 13, 1925. See also Rules 37 (b)

(2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to sustain the verdict.

2. Whether the indictment was correctly predicated on Section 37 of the Criminal Code.

STATUTES INVOLVED

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 3 of the National Cattle Theft Act of August 18, 1941, c. 366, 55 Stat. 631 (18 U. S. C., Supp. V, 419b), provides:

> Whoever shall transport or cause to be transported in interstate or foreign commerce any cattle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000 or by imprisonment for not more than five years, or both.

Section 7 of the National Stolen Property Act of May 22, 1934, c. 333, 48 Stat. 794, as added by

the Act of August 3, 1939, c. 413, § 5, 53 Stat. 1179 (18 U. S. C. 418a), provides:

> If two or more persons enter into an agreement, confederation, or conspiracy to violate any provision of this Act, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as hereinbefore provided by this Act.

STATEMENT

On September 18, 1943, a one-count indictment was filed in the District Court for the District of Nebraska charging that petitioner, one Yellow Thunder, and one Janis conspired, in violation of Section 37 of the Criminal Code, to transport stolen cattle in interstate commerce, in violation of Section 3 of the National Cattle Theft Act, 18 U. S. C., Supp. V, 419b, *supra*. Seven overt acts were alleged. (R. 1–4.) Petitioner was found guilty after a jury trial (R. 9) and sentenced to two years' imprisonment (R. 41). On appeal to the Circuit Court of Appeals for the Eighth Circuit, the judgment of conviction was affirmed (R. 156).

The Government's evidence, consisting principally of the testimony of Yellow Thunder, who pleaded guilty (see R. 150),[1] was, in brief, as follows:

[1] Janis, who also pleaded guilty, died before the trial (see R. 150–151).

On or about December 30, 1942, petitioner and Janis went to the home of Yellow Thunder near Kile, South Dakota, where the three "talked about cattle." Petitioner told Yellow Thunder "to get him 10 head of cattle" and "not give a damn what brand is on them." (R. 50.) Yellow Thunder, accordingly, on February 9, 1943, stole ten head of white-faced cattle, "branded with G over S," from one George Shellenberger (R. 50–51, 46–47). Pursuant to petitioner's instructions, Yellow Thunder drove the cattle to Janis' barn, because "That's where they were going to load them." Petitioner and Janis were present at the time. (R. 51.) Yellow Thunder told petitioner that the cattle were stolen (R. 53). Nine of the cattle were loaded into petitioner's truck, but the tenth "got away" (R. 51; cf. R. 47). Petitioner told Yellow Thunder that the cattle were to be taken to Norfolk, Nebraska (R. 52). Petitioner, Yellow Thunder, and Janis got into the truck and proceeded to Norfolk, where petitioner sold the cattle, paid Yellow Thunder $200 "for getting his cows," and paid Janis $25 for "helping drive" (R. 52, 56).

ARGUMENT

1. Petitioner's contention that the proof does not support the verdict (Pet. 16–19, 20–26) is patently without merit in view of the overwhelm-

ing evidence of guilt summarized above. Obviously, as the court below observed (R. 154), the fact that petitioner's version of the transaction conflicted with that of the government witnesses presented merely a question of credibility for the jury to determine.

2. Petitioner's contention that the indictment should have been predicated on 18 U. S. C. 418a (*supra*, pp. 2–3), "the Special Conspiracy Statute relating to Cattle Stealing," rather than on Section 37 of the Criminal Code, the general conspiracy statute (Pet. 20, 26), is founded on a misconception of the purview of 18 U. S. C. 418a, as pointed out by the trial court in its memorandum opinion on motion for a new trial (R. 32–34). 18 U. S. C. 418a is the codified version of the conspiracy section (7) of the National Stolen Property Act of 1934, which was added by the Act of August 3, 1939, amending the Stolen Property Act (see pp. 2–3, *supra*). That section relates only to conspiracies to violate the Stolen Property Act, codified as 18 U. S. C. 413–419. It has no reference to the National Cattle Theft Act, codified as 18 U. S. C., Supp. V, 419a–419d, which was enacted after and entirely independently of the Stolen Property Act. Of course, the point would not be material in any event even if well taken. *United States* v. *Hutcheson*, 312 U. S. 219, 229.

CONCLUSION

The petition for a writ of certiorari manifestly presents no question meriting further review by this Court. We therefore respectfully submit that it should be denied.

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